

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

CIXTO CRUZ MURILLO,
Petitioner,

v.

CRUZ,
Respondent.

No. 1:23-cv-0136 JLT SKO (HC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS
(Doc. 15)

ORDER DISMISSING PETITION FOR WRIT
OF HABEAS CORPUS, DIRECTING CLERK
OF COURT TO ENTER JUDGMENT AND
CLOSE CASE

ORDER DECLINING TO ISSUE
CERTIFICATE OF APPEALABILITY

Cixto Cruz Murillo is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The magistrate judge determined the petition is successive. (Doc. 15 at 2-3.) In addition, the magistrate judge found Petitioner did not show he “obtained prior leave from the Ninth Circuit to file his successive petition attacking the conviction.” (*Id.* at 4.) Thus, the magistrate judge found “this Court has no jurisdiction to consider Petitioner's renewed application for relief from that conviction under Section 2254” and recommended the petition be dismissed. (*Id.*, citing *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997); *Nunez v. United States*, 96 F.3d 990, 991 (9th Cir. 1996).)

The Findings and Recommendations were served on Petitioner on March 1, 2023, and contained a notice that any objections must be filed within 21 days of the date of service. (Doc.

1 15 at 4.) In addition, the Court advised Petitioner that the “failure to file objections within the
2 specified time may waive the right to appeal the District Court’s order.” (*Id.*, citing *Martinez v.*
3 *Ylst*, 951 F.2d 1153 (9th Cir. 1991).) No objections were filed and the deadline to do so has
4 expired.

5 According to 28 U.S.C. § 636 (b)(1)(C), the Court conducted a *de novo* review of the case.
6 Having carefully reviewed the entire file, the Court concludes the Findings and
7 Recommendations are supported by the record and proper analysis. In addition, the Court declines
8 to issue a certificate of appealability. A state prisoner seeking a writ of habeas corpus has no
9 absolute entitlement to appeal a district court’s denial of his petition, and an appeal is only
10 allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-336 (2003). The
11 controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. §
12 2253, which provides as follows:

13 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
14 district judge, the final order shall be subject to review, on appeal, by the court of
appeals for the circuit in which the proceeding is held.

15 (b) There shall be no right of appeal from a final order in a proceeding to test
16 the validity of a warrant to remove to another district or place for commitment or
17 trial a person charged with a criminal offense against the United States, or to test
the validity of such person's detention pending removal proceedings.

18 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
appeal may not be taken to the court of appeals from—

19 (A) the final order in a habeas corpus proceeding in which the
20 detention complained of arises out of process issued by a State
court; or

21 (B) the final order in a proceeding under section 2255.

22 (2) A certificate of appealability may issue under paragraph (1) only if the
23 applicant has made a substantial showing of the denial of a constitutional
right.

24 (3) The certificate of appealability under paragraph (1) shall indicate which
25 specific issue or issues satisfy the showing required by paragraph (2).

26 If a court denies a petitioner’s petition, the court may only issue a certificate of
27 appealability when a petitioner makes a substantial showing of the denial of a constitutional right.
28 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that

1 “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have
2 been resolved in a different manner or that the issues presented were ‘adequate to deserve
3 encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting
4 *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

5 In the present case, the Court finds that Petitioner did not make the required substantial
6 showing of the denial of a constitutional right to justify the issuance of a certificate of
7 appealability. Reasonable jurists would not find the Court’s determination that Petitioner is not
8 entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to
9 proceed further. Thus, the Court declines to issue a certificate of appealability. Based upon the
10 foregoing, the Court **ORDERS**:

- 11 1. The Findings and Recommendations issued on March 1, 2023 (Doc. 15), are
12 **ADOPTED** in full.
- 13 2. The petition for writ of habeas corpus is dismissed with prejudice.
- 14 3. The Clerk of Court is directed to enter judgment and close the case.
- 15 4. The Court declines to issue a certificate of appealability.

16 This order terminates the action in its entirety.

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18 IT IS SO ORDERED.

19 Dated: **April 6, 2023**


UNITED STATES DISTRICT JUDGE